93-753

No. ____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

STATE OF NORTH CAROLINA,
Petitioner,

v.

KENNETH MICHAEL BRYANT and
MARVIN EARL WILLIAMS, JR.
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE NORTH CAROLINA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES NORTH CAROLINA'S REASONABLE DOUBT INSTRUCTION VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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No. ____

IN THE SUPREME COURT OF THE UNITED STATES
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STATE OF NORTH CAROLINA,
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PETITION FOR WRIT OF CERTIORARI
TO THE NORTH CAROLINA SUPREME COURT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, the State of North Carolina, by and through its undersigned counsel, the Honorable Michael F. Easley, Attorney General of North Carolina, and Assistant Attorney General Jeffrey P. Gray, respectfully pray that a writ of certiorari issue to review the judgments of the North Carolina Supreme Court, entered on July 30, 1993, which set aside Respondent Kenneth Michael Bryant's guilty verdict

and life sentence, and on September 10, 1993, which set aside Respondent Marvin Earl Williams, Jr.'s guilty verdict and death sentence, and awarded both defendants a new trial.[1]

OPINIONS BELOW

This petition seeks review of the published decisions by the North Carolina Supreme Court, which are reported at *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993), and *State v. Williams*, 334 N.C. 440, 434 S.E.2d 588 (1993), and which are reproduced in the Appendix at 1a-58a.

JURISDICTION

The judgments of the North Carolina Supreme Court were entered on August 18 and September 29, 1993.[2] The jurisdiction of this Court to review the North Carolina Supreme Court's decisions is invoked pursuant to 28 U.S.C. § 1257(3) and Rule 10.1(b) and (c) of the Rules of the Supreme Court of the United States.

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[1] The parties to this proceeding are the Petitioner, the State of North Carolina (hereinafter referred to as "the State"), and Respondents Kenneth Michael Bryant (hereinafter referred to as "Bryant") and Marvin Earl Williams, Jr. (hereinafter referred to as "Williams").

[2] The opinions of the North Carolina Supreme Court were filed on July 30, 1993 and September 10, 1993. The actual judgments, however, are entered in the docket by the clerk twenty (20) days after the filing of the opinion. N.C. R. App. P. 32(b).

CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS

U.S. Const. Amend. V: No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

U.S. Const. Amend. XIV, § 1: [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Respondent Kenneth Michael Bryant

In December 1989, Bryant was living and working in Jackson, Mississippi. His estranged wife, Doris Jones Bryant, was living with the victim in a trailer on Highway 43 across from the Hitching Post bar in Edgecombe County, North Carolina. In early December 1989, Bryant had been beaten by the victim and the victim's brother after Bryant confronted the victim in the parking lot of a store. Bryant returned to Mississippi, grew a beard, had his hair curled, and came back to Edgecombe County on December 30, 1989.

Bryant's girlfriend, Cheryl Marlowe, testified for the State under a grant of immunity. During the evening of December 30, 1989, she picked Bryant up at his sister's house and the two of them drove to the Good Tymes bar in

Rocky Mount where they drank beer and shot pool. Bryant tested his disguise by asking numerous bar patrons who were acquaintances if they recognized him and also made statements that he was going to harm the victim. Bryant and Ms. Marlowe left the Good Tymes bar at approximately 9:30 p.m. and drove around the back roads of Nash and Edgecombe Counties. At approximately 10:30 p.m. Ms. Marlowe let Bryant out of the car at the intersection of a rural paved road and Highway 43 near the victim's trailer and the Hitching Post bar. Bryant instructed Ms. Marlowe to continue driving down the road and then return to pick him up in approximately five minutes. Prior to getting out of the car Ms. Marlowe saw Bryant retrieve something from under the seat where he had earlier placed a gun.

A patron of the Good Tymes bar was standing in the lighted parking lot at approximately 10:00 p.m. or 10:30 p.m. on the night of the murder when he heard the sound of a gun shot come from the victim's trailer. Within forty or forty-five seconds of the shot, Bryant ran past him and into a corn field in the direction of the intersection.

Ms. Marlowe testified that after she picked Bryant back up at the intersection he unloaded the gun and threw a shell casing out of the window during the drive back to his sister's house. Bryant told Ms. Marlowe that when he arrived at the victim's trailer, he knocked on the door, the victim looked through the blinds and both men grabbed for the door knob. Bryant then fired his gun through the door.

Doris Bryant testified that in April 1989 her estranged husband had kicked open the door of her apartment and threatened to kill the victim and her. On the night of the murder she returned to the victim's trailer between 10:30 p.m. and 10:40 p.m. and discovered the victim's body lying against the door.

Investigation by law enforcement and medical personnel revealed a gun shot wound to the victim's head and a bullet hole in the frame of the door. Bryant was extradited from the State of Mississippi and indicted for first-degree murder. He was tried non-capitally and found guilty of first-degree murder.

Bryant did not testify at trial, but he presented family members as witnesses to establish an alibi defense.

The trial court instructed the jury on reasonable doubt using an instruction other than the pattern jury instruction;[3] one that has been used by North Carolina trial judges for many years and in many cases. The defense did not object to the reasonable doubt instruction as given.

Following Bryant's trial and conviction, his appeal was heard in the North Carolina Supreme Court on February

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[3] In North Carolina a trial judge is not required to instruct on reasonable doubt, but if an instruction is given it must be legally correct. *State v. Montgomery*, 331 N.C. 559, 570, 417 S.E.2d 742, 748 (1992). North Carolina's pattern jury instruction on reasonable doubt is N.C.P.I.--Crim. 101.10.

16, 1993. The court granted Bryant a new trial, holding that the United States Constitution, and this Court's decisions in *Cage v. Louisiana*, 498 U.S. 39 (1990), and *Sullivan v. Louisiana*, 508 U.S. ___, 113 S. Ct. 2078 (1993), were violated by the reasonable doubt instruction given by the trial judge. *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993).

B. Respondent Marvin Earl Williams, Jr.

In the early morning of February 10, 1989, a first shift security guard arrived at the metal fabricating company in Wayne County, North Carolina where he was employed. He was unable to enter the premises or locate the guard, Theron Price, whom he was scheduled to relieve. He called the company president who arrived shortly thereafter and opened the gate. They found the door to the payroll office partially open, a light emanating from within, and just outside the office door an acetylene torch and a cart bearing oxygen and acetylene tanks. The police were summoned. Inside the payroll office the police observed a floor safe illuminated by a gooseneck lamp; there was carbon on the safe's hinges and knob. The police determined that the torch was improperly adjusted, and that it would have created a lot of smoke and carbon but would not have cut metal.

Theron Price, the seventy-one year old security guard, was discovered lying on his back in a shed next to the payroll office, with blood on his face and head. He was dead. Parallel lines in the dirt indicated he had been dragged

into the shed. Tennis shoe tracks were also found leading to the building which housed the acetylene torches.

Several days after the victim's body was discovered, an employee of the company reported he knew the identity of the killer. He and Williams, also an employee of the company, had discussed breaking into the company and robbing the safe in the early part of February. On February 11, Williams had asked the employee if he was "ready to move." The employee indicated he was not, and Williams said, "I'm gone. I'm on the move." The next day, after learning of the victim's death, the employee confronted Williams. Williams said he did not mean to kill the victim, but "the man kept coming." The employee agreed to cooperate with the police and was furnished a recording device. A conversation was recorded between the employee and Williams wherein Williams described what happened during the break-in and admitted killing the victim.

Williams was arrested and charged with first-degree murder, burglary with explosives, and attempted safe-cracking. At the time of his arrest he was wearing tennis shoes which matched the footprints found at the scene.

Williams was tried capitally and convicted of first-degree murder on the theories of felony murder, with the underlying felony of burglary with explosives, and premeditation and deliberation. He was also convicted of burglary with explosives and attempted safe-cracking. After a sentencing hearing, the jury recommended and the trial court imposed a sentence of death. Williams was also sentenced

to thirty years for the burglary conviction. Judgment was arrested in the attempted safe-cracking conviction.

Williams introduced no evidence at trial.

The trial court instructed on reasonable doubt using an instruction virtually identical to the one used in *Bryant*. The defense did not object to the reasonable doubt instruction as given.

Following Williams' trial and convictions, his appeal was heard in the North Carolina Supreme Court on February 10, 1992. The Supreme Court, finding no other errors in either the guilt-innocence or the sentencing phases of his trial, granted Williams a new trial for the reasons articulated in *Bryant*. *State v. Williams*, 334 N.C. 440, 447, 434 S.E.2d 588, 592 (1993).

REASONS WHY THE WRIT SHOULD ISSUE

I. THE NORTH CAROLINA SUPREME COURT INTERPRETED *CAGE V. LOUISIANA* TOO BROADLY AND CONTRARY TO OTHER STATE AND FEDERAL JURISDICTIONS BY HOLDING THAT THE REASONABLE DOUBT INSTRUCTION VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS.

The North Carolina Supreme Court's holding that the reasonable doubt instruction presented here lowers the State's burden of proof in violation of the Due Process Clause of the Fifth and Fourteenth Amendments is erroneous. The court's holding raises an important issue of federal constitutional law which is worthy of certiorari review to clarify this Court's holding in *Cage v. Louisiana*, 498 U.S. 39 (1990) (*per curiam*).

The trial court in *Bryant* instructed the jury as follows:

> When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or satisfied to a moral certainty of the truth of the charge.
>
> If, after considering, comparing and weighing all the evidence, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt; otherwise not.
>
> A reasonable doubt, as that term is employed in the administration of criminal law, is an honest substantial misgiving generated by the insufficiency of the proof.

State v. Bryant, 334 N.C. 333, 339, 432 S.E.2d 291, 294-295 (1993) (emphasis by the court).[4] The court rejected the State's argument that the alleged infirm instruction did not violate *Cage*, and, even if it did, it should be addressed under the court's "plain error" rule.

In *Cage*, the jury was instructed as follows:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A

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[4] The instruction used by the trial court was taken almost verbatim from *State v. Hammonds*, 241 N.C. 226, 232, 85 S.E.2d 133, 138 (1954), an instruction "that has been employed by our trial judges for many years and in many cases." *State v. Williams*, 334 N.C. 440, 467, 434 S.E.2d 588, 604 (1993)(Meyer, J., dissenting). The instruction in *Williams* was virtually the same in its entirety as the instruction in *Bryant*. *Williams*, 334 N.C. at 446, 434 S.E.2d at 592. The instruction is hereinafter referred to as the "*Bryant* instruction."

> reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

Cage, 498 U.S. at 40 (emphasis in original). This Court held this instruction to be contrary to the "beyond a reasonable doubt" requirement articulated in *In re Winship*, 397 U.S. 358 (1970). The instruction was defective because

> the words "substantial" and "grave", as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id. at 41. In so doing, this Court articulated a general disapproval of the words "substantial" and "grave" in any definition of reasonable doubt because they require a higher degree of doubt than is required for acquittal under the reasonable doubt standard, but it then unmistakably stressed that these words became reversible error only because they were used in combination with the reference to "moral

certainty" rather than evidentiary certainty. In the case at bar, no such fatal combination exists.

A. *Cage v. Louisiana* Was Intended To Be Narrowly Drawn And Applicable Only To Certain Terms In Combination, Including "Grave Uncertainty", Which Lower The State's Burden Of Proof.

Cage is narrowly drawn and was intended to be narrowly read. The North Carolina Supreme Court erroneously read *Cage* much too broadly. None of the terms condemned in *Cage* are found in combination in North Carolina's instruction. The court erred further in determining that the crucial term condemned by this Court in *Cage* was "moral certainty."

In *Gaskins v. McKellar*, ___ U.S. ___, 111 S.Ct. 2277, *reh'g denied*, ___ U.S. ___, 112 S. Ct. 14, (1991), the petitioner raised the question whether *Cage* announced a new rule. In a memorandum opinion concurring in the denial of the petition, Justice Stevens reasoned that the question was not properly presented since that instruction did not contain the same flaw as the *Cage* instruction. In so doing, Justice Stevens acknowledged that *Cage* is to be read narrowly and he emphasized the critical import of the "grave uncertainty" language. Numerous state jurisdictions, including North Carolina, have looked to *Gaskins* in deter-

mining that *Cage* is to be read narrowly and that their jury instructions on reasonable doubt did not violate the Due Process Clause.[5]

Justice Stevens' concurrence in the denial of the petition in *Gaskins* is not a majority opinion of this Court, and is only the opinion of a single Justice. However, this memorandum opinion gives weight to the Petitioner's argument that *Cage* is narrowly drawn and was intended to be narrowly read, especially in light of the reliance by numerous state and federal jurisdictions on the language in the memorandum opinion. The *Bryant* court's attention was again directed to *Gaskins* in a dissenting opinion. *Bryant*, 334 N.C. at 466, 432 S.E.2d at 298 (Meyer, J., dissenting).

The North Carolina Supreme Court nevertheless ignored *Gaskins* and concluded that "the crucial term in the reasonable doubt instruction condemned by the United States Supreme Court in *Cage* is 'moral certainty.'" *Id.* at 342, 432 S.E.2d at 297. The court rejected the State's argument that "moral certainty" violates *Cage* only where it is used in combination with the terms "substantial doubt" or "grave

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[5] *See, State v. Hudson*, 331 N.C. 122, 143 n. 4, 415 S.E.2d 732, 743 n. 4 (1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 983, *reh'g denied*, ___ U.S. ___, 113 S. Ct. 1404 (1993). *See, also, Stewart v. State*, 601 So. 2d 491, 504-505 (Ala. Crim. App. 1992); *Ex parte Adkins*, 600 So. 2d 1067, 1071 (Ala. Crim. App. 1991); *McGee v. State*, 594 So. 2d 219, 222-224 (Ala. Crim. App. 1991); *State v. Dizon*, 28 Conn. App. 444, 448, 611 A.2d 432, 433-434 (1992); *State v. Hoffman*, 123 Idaho 638, ___, 851 P.2d 934, 939 (1993); *State v. Williams*, 313 Or. 19, 40, 828 P.2d 1006, 1020-1021 (1992).

uncertainty." Accordingly, the North Carolina Supreme Court's reading of *Cage* places it in a very small minority.

B. The Overwhelming Majority of State And Federal Jurisdictions Addressing Reasonable Doubt Instructions Have Properly Read *Cage* Narrowly.

The state and federal jurisdictions addressing jury instructions in light of *Cage* have overwhelmingly rejected the view of the North Carolina Supreme Court. *E.g.*, *Smith v. State*, 588 So. 2d 561, 567-569 (Ala. Crim. App. 1991) (finding no error in use of terms "actual and substantial doubt" and "moral certainty"); *People v. Sandavol*, 14 Cal. Rptr. 2d 342, 348, 841 P.2d 862, 878 (finding use of term "moral certainty" proper), *cert. granted in part*, ___ U.S. ___, 1993 WL 232901 (1993); *People v. Jennings*, 279 Cal. Rptr. 780, 812, 807 P.2d 1009, 1041-1042 (same), *cert. denied*. ___ U.S. ___, 112 S. Ct. 443 (1991); *Bradford v. State*, 261 Ga. 833, 835, 412 S.E.2d 534, 536 (1992) (instruction permissible when trial court used only "moral and reasonable certainty"); *Starr v. State*, 201 Ga. App. 73, 75, 410 S.E.2d 180, 182 (1991) (specifically rejecting argument that *Cage* absolutely precluded use of term "moral certainty"); *State v. Hoffman*, 123 Idaho 638, ___, 851 P.2d 934, 939 (1993) (finding use of term "moral certainty" proper); *Commonwealth v. Beldotti*, 409 Mass. 553, 562, 567 N.E.2d 1219, 1225 (1991) (instruction permissible with "moral certainty" language); *State v. Bernard*, 820 S.W.2d 674, 681 (Mo. Ct. App. 1991) (instruction permissible where no *Cage* language used), *rev'd on other grounds*, 849

S.W.2d 10 (Mo. 1993)(*en banc*); *State v. Morely*, 239 Neb. 141, 152-156, 474 N.W.2d 660, 668-670 (1991)(instruction permissible with "moral certainty" and "actual and substantial doubt" language); *Lee v. State*, 107 Nev. 507, 508, 813 P.2d 1010, 1011 (1991) (same); *Lord v. State*, 107 Nev. 28, 38-40, 806 P.2d 548, 554-556 (1991) (same); *State v. Hudson*, 331 N.C. 122, 141-143, 415 S.E.2d 732, 742-743 (1992) (instruction proper when contains none of the language condemned in *Cage*), *cert. denied*, ___ U.S. ___, 113 S. Ct. 983, *reh'g denied*, ___ U.S. ___, 113 S. Ct. 1404 (1993); *State v. Williams*, 313 Or. 19, 40-42, 828 P.2d 1006, 1020-1021 (1992) (specifically rejecting argument that instruction containing phrase "moral certainty" is *per se Cage* error); *State v. Johnson*, 410 S.E.2d 547, 554 (S.C. 1991) (instruction permissible with "substantial doubt," and not an "imaginary doubt," where "moral certainty" not used; emphasized terms must be used in combination), *cert. denied*, ___ U.S. ___, 112 S. Ct. 169 (1992); *State v. Gonzalez*, 822 P.2d 1214, 1217-1218 (Utah 1991) (instruction proper when contains none of the language condemned in *Cage*); *United States v. Taylor*, 997 F.2d 1551, 1557 (D.C. Cir. 1993) (same); *United States v. Edelin*, 996 F.2d 1238, 1242-1243 (D.C. Cir. 1993) (same); *United States v. Polan*, 970 F.2d 1280, 1286 (3rd Cir. 1992) (same).

Only two states' appellate courts, New York and South Carolina, have struck down reasonable doubt instructions containing the phrase "moral certainty", and any of the words condemned in *Cage*. In each instance the instruction contained numerous other terms that in combination arguably lowered the state's burden of proof. *See*, *State v. Manning*,

409 S.E.2d 372, 374-375 (S.C. 1991) ("[m]oral certainty and beyond a reasonable doubt are the same things in the eyes of the law;" "either of those two phrases . . . connote[s] a degree of proof which is distinguishable from an absolute certainty;" trial court also defined reasonable doubt as "a doubt for which you can give a real reason" and erroneously instructed on circumstantial evidence), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1282 (1992)[6]; *People v. Frank*, 588 N.Y.S. 2d 670 (A.D. 4 Dept. 1992)("morally and reasonably certain;" "reasonable doubt must therefore be based entirely and absolutely on good sound substantial reason;" trial court also instructed jury that it was "possible to establish the guilt of a defendant to a reasonable degree of certainty" and that the People were held to that degree of proof and only if the People failed to sustain that burden was the defendant entitled to a reasonable doubt).[7]

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[6] The Fourth Circuit Court of Appeals also found a substantially similar instruction from South Carolina constitutionally infirm in *Adams v. Aiken*, 965 F.2d 1306, 1311 (4th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2966 (1993), but held *Cage* was not to be applied retroactively. *See, also, State v. Baker*, 424 S.E.2d 492, 493 (S.C. 1992) (instruction which used term "strong uncertainty" violated *Cage*).

[7] In another more recent case, the same court struck down a reasonable doubt instruction directly equating reasonable doubt with a "moral certainty". *See, People v. Melito*, ___ N.Y.S.2d ___, 1993 WL 264195 (A.D. 4 Dept. 1993)(memorandum opinion). *See, also, People v. Geddes*, 588 N.Y.S.2d 670, 671 (A.D. 4 Dept. 1992) (instruction which included "good sound substantial reason" found erroneous on non-*Cage* grounds).

In each instance where a court has found *Cage* error, numerous other words, terms or phrases existed, in addition to "moral certainty", which caused the instruction to lower the state's burden of proof. In *Bryant*, the instruction has only "moral certainty" and a single reference to "substantial" in common with *Cage*, and here, "substantial" did not modify "doubt", nor was "moral certainty" directly equated to "reasonable doubt."

Additionally, with the exception of a single case, every federal jurisdiction addressing a *Cage* issue has done so in terms of merely defining reasonable doubt, or the standard of review for jury instructions, or whether *Cage* created a "new rule" for purposes of federal habeas relief.[8] Only the Fourth Circuit Court of Appeals has applied *Cage* to a jury instruction, *Adams v. Aiken*, 965 F.2d 1306, 1311 (4th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 2966 (1993), and that instruction was substantially similar to an instruction previously found violative of *Cage* by the

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[8] *See*, *United States v. Merlos*, 984 F.2d 1239, 1241-1242 (D.C. Cir. 1993) (standard of review for jury instruction); *Rock v. Zimmerman*, 959 F.2d 1237, 1247 n.3 (3rd Cir. 1992) (same); *United States v. Russell*, 971 F.2d 1098, 1109 (4th Cir. 1992) (defining reasonable doubt); *Adams v. Aiken*, 965 F.2d 1306, 1310-1312 (4th Cir. 1992) (*Cage* not "new rule"), *cert. denied*, __ U.S. __, 113 S. Ct. 2966 (1993); *Skelton v. Whitley*, 950 F.2d 1037, 1038 (5th Cir. 1992) (same), *cert. denied*, ___ U.S. ___, 113 S. Ct. 102 (1992); *Dowell v. C.N. Lensing*, 805 F. Supp. 1335, 1349 (M.D. La. 1992) (same); *United States v. Nolasco*, 826 F.2d 869, 871-872 (9th Cir. 1991) (defining reasonable doubt and standard of review for jury instruction); *Singleton v. Thigpen*, 806 F. Supp. 936, 942-943 (S.D. Ala. 1992) (*Cage* not "new rule").

South Carolina Supreme Court in *Manning*, 409 S.E.2d 372.[9]

In conflict with the overwhelming majority of state and federal decisions, the North Carolina Supreme Court erroneously concluded that "moral certainty" was the crucial term condemned in *Cage*. The reasonable doubt instruction in *Bryant*, however, does not contain a combination of terms which might lower the State's burden of proof. In *Cage*, this Court explicitly viewed the instructions as a whole. Although this Court disapproved the use of the phrase "moral certainty" in conjunction with the phrases "grave uncertainty" and "substantial doubt" because they suggest a higher degree of doubt than is constitutionally required for a "reasonable" doubt, 498 U.S. at 41, *Cage* nevertheless does not preclude the use of the term "moral certainty" in defining reasonable doubt. In *Cage*, it was the definition of reasonable doubt, which impermissibly equated reasonable doubt with a "grave uncertainty" and "actual substantial doubt," coupled with the reference to "moral certainty" that invalidated the jury instruction. It was not the use of any one of these terms alone, but rather the combination of all three, that rendered the *Cage* charge unconstitutional. In *Bryant* the trial court used the words "honest substantial misgiving" once and the term "moral certainty" twice, but it did not use the phrase "grave uncertainty" at all.

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[9] Also, in a case addressing a defendant's requested instruction on *corpus delicti*, the Fourth Circuit Court of Appeals noted that this Court "cautioned against using the phrase 'moral certainty'" in *Cage*. *United States v. Russell*, 971 F.2d 1098, 1109 n. 21 (4th Cir. 1992).

In the case at bar, the charge by the trial court was substantially different from the charge in *Cage*. Unlike the definition of reasonable doubt in the *Cage* charge, this definition does not suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. The North Carolina Supreme Court erroneously applied *Cage* to hold that a reference to "moral certainty", without other terms modifying reasonable doubt, unconstitutionally lessens the burden of proof required for conviction.

C. The Court Erroneously Read *Cage* Too Broadly And, In Fact, The Instruction Raises The State's Burden Of Proof.

The North Carolina Supreme Court addressed reasonable doubt instructions in light of *Cage* in two cases prior to its *Bryant* decision. *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 983, *reh'g denied*, ___ U.S. ___, 113 S. Ct. 1404 (1993), and *State v. Montgomery*, 331 N.C. 559, 417 S.E.2d 742 (1992). In *Hudson* the reasonable doubt instruction contained none of the three terms which were condemned in *Cage*. The court rejected the defendant's contention that "honest substantial misgiving" equated to "actual substantial doubt," and upheld the instruction as constitutional. *Id.* at 142, 415 S.E.2d at 742. Notably, the *Hudson* instruction shared a sentence in common with the *Bryant* instruction: "A reasonable doubt, as that term is employed in the administration of criminal law, is an honest substantial misgiving generated by insufficiency of the proof." *Id.* at 142, 415 S.E.2d at 743 (emphasis in original).

The instruction in *Montgomery* was virtually the same in its entirety as the one in *Bryant* and contained the two references to "moral certainty" and the one to "actual substantial misgiving." *See*, *Bryant*, 334 N.C. at 339, 341, 432 S.E.2d at 294-295, 296. Only two members of the *Montgomery* court held that the use of the terms "moral certainty" and "substantial misgiving" violated the requirements of the Due Process Clause. The phrase "honest substantial misgiving" in both *Montgomery* and *Bryant* was the only phrase defining reasonable doubt; the term "moral certainty" was used in other contexts. The *Bryant* court acknowledged that the term "honest substantial misgiving" was modified by the additional phrase, "generated by the insufficiency of the evidence," which referred the jury back to an evidentiary standard. *Bryant*, 334 N.C. at 343, 432 S.E.2d at 297. In spite of this, the court still held that the instruction violated the Due Process Clause since it contained the "moral certainty" language found in *Cage*. Even if the court were correct, and "moral certainty" was the crucial term in *Cage*, that term was used in entirely different contexts in the instruction presented here. In *Cage*, the instruction stated:

> A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

Cage, 498 U.S. at 40 (emphasis omitted). In contrast, in the *Bryant* instruction, the phrase "moral certainty" was sandwiched between repeated references to the evidence and to the sufficiency of the State's proof.

> When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or satisfied to a moral certainty of the truth of the charge.

Bryant, 334 N.C. at 339, 432 S.E.2d at 294-295 (emphasis added; emphasis in original). The instruction then refers the jury back to an evidentiary standard.

> If, after considering, comparing and weighing all the evidence, the minds of the jurors are left in such a condition that they cannot say they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt; otherwise not.

Id. at 339, 432 S.E.2d at 295 (emphasis added; emphasis in original). This is the inverse of the use of "moral certainty" in *Cage*.

When placed in context, the "moral certainty" phrase in the reasonable doubt instruction here bears little similarity

to the *Cage* reasonable doubt instruction.[10] This Court in *Cage* was concerned that the combination of terms in the instruction there suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard. In contrast, the *Bryant* instruction, if anything, raises the standard of proof to be reached by the State because it requires that after considering, comparing and weighing the evidence, the jury must be convinced of a defendant's guilt with an "abiding faith to a moral certainty" based on that evidence. This does not require a higher degree of doubt, but rather a higher degree of certainty before a jury may convict a defendant. In other words, the jury must be morally certain that the evidence is sufficient to convict. Thus, the instruction here enhances the concept of reasonable doubt in North Carolina when used; it is an instruction which favors defendants, not the prosecution. Nothing in the instruction allows a juror to vote to convict solely on his moral belief in the defendant's guilt. Accordingly, there is no *Cage* error.

The *Bryant* majority is misguided in its view of the reasonable doubt instruction here. The instruction enhances the concept of reasonable doubt because it requires the jurors to hold the State to a higher standard of proof than is constitutionally mandated. This has long been the view of both prosecutors and the defense bar. *See*, *Schneble v.*

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[10] *Cupp v. Naughten*, 414 U.S. 141, 147 (1973) (jury instructions must be read contextually); *State v. Williams*, 308 N.C. 47, 63, 301 S.E.2d 335, 346 (same), *cert. denied*, 464 U.S. 865 (1983).

Florida, 405 U.S. 427, 431 (1972) (capital case; jury charged that it must be "satisfied beyond a reasonable doubt" and "to a moral certainty" before it could convict, thus jury must have considered all evidence against defendant).

A defendant may only legitimately complain of a jury instruction if the instruction was harmful and prejudicial; here, it was neither. The North Carolina Supreme Court read *Cage* too broadly, and the State is now unnecessarily encumbered with a federal constitutional mandate for all cases where this instruction was used.[11] Thus, *Bryant* places squarely before this Court the important question of whether the Due Process Clause mandates reversal in every case where the reasonable doubt instruction utilized only one of the terms condemned in *Cage*.

II. THE NORTH CAROLINA SUPREME COURT INTERPRETED *SULLIVAN V. LOUISIANA* ERRONEOUSLY AND APPLIED A STANDARD OF REVIEW INCONSISTENT WITH *ESTELLE V. MCGUIRE* AND *BOYDE V. CALIFORNIA*.

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[11] The perceived error here affects both capital and non-capital trials and requires a totally new trial. As stated by the dissenting justice in both of these cases at bar reversed on "*Bryant* error", "[t]he impact of *McKoy* on our criminal justice system may dim in comparison to the impact of this Court's interpretation of *Cage*." *State v. Williams*, 334 N.C. 440, 467, 434 S.E.2d 588, 604 (1993)(Meyer, J., dissenting, referring to *McKoy v. North Carolina*, 494 U.S. 433 (1990), which affected only sentencing proceedings of capital trials).

In *Cage v. Louisiana*, 498 U.S. 39 (1990), this Court held the standard of review to be "how reasonable jurors could have understood the charge as a whole." *Id.* at 41, *citing*, *Francis v. Franklin*, 471 U.S. 307 (1985). Following *Cage*, there was some ambiguity as to the appropriate standard of review for jury instructions alleged to be constitutionally infirm. This Court had first adopted the "reasonable likelihood" standard in *Boyde v. California*, 494 U.S. 370, 380 (1990), but in two later opinions appeared to have endorsed an arguably different standard, *Cage*, 498 U.S. 39, and *Yates v. Evatt*, 500 U.S. ___, 111 S. Ct. 1884, 1892 (1991) (what a "reasonable juror" could have understood the instruction to mean). In *Estelle v. McGuire*, ___ U.S. ___, 112 S. Ct. 475 (1991), this Court "disapprove[d] the standard of review language in *Cage* and *Yates*, and reaffirmed[ed] the standard set out in *Boyde*." *Estelle*, ___ U.S. at ___ n. 4, 112 S.Ct. at 482 n. 4. Therefore, an error occurs only when there is a reasonable likelihood that the jury applied the instruction in an improper manner. In so doing, an appellate court must view the instruction as a whole in the context of the trial record. *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973).

In *Sullivan v. Louisiana*, ___ U.S. ___, 113 S. Ct. 2078 (1993), which involved a reasonable doubt instruction that was essentially identical to the one held unconstitutional in *Cage*, this Court held that a constitutionally infirm reasonable doubt instruction could not be harmless error.

Sullivan, ___ U.S. at ___, 113 S.Ct. at 2080, 2082-2083.[12] However, the question whether the jury instruction in *Sullivan* (i.e. a "*Cage* instruction") could survive under the *Boyde* standard of review was not presented to this Court. *See*, *Sullivan*, ___ U.S. at ___ n. 1, 113 S. Ct. at 2081 n. 1.

Assuming the instruction here violated *Cage*, the North Carolina Supreme Court erroneously interpreted *Sullivan* and applied a standard of review inconsistent with *Estelle* and *Boyde*. The question of the standard of review was raised in the court below. *See*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989).

In each of the four cases where the court has addressed a reasonable doubt instruction in light of *Cage*, *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 983, *reh'g denied*, ___ U.S. ___, 113 S.Ct. 1304 (1993), *State v. Montgomery*, 331 N.C. 559, 417 S.E.2d 742 (1992), and the cases at bar, *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993), and *State v. Williams*, 334 N.C. 440, 434 S.E.2d 588 (1993), the State has argued that *Estelle* and *Boyde* defined the proper standard of review. In *Hudson*, the court merely recognized

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[12] *Sullivan* was decided by this Court on June 1, 1993, between oral argument and the decision of the North Carolina Supreme Court in *Bryant*. *Sullivan* was the subject of a memorandum of additional authority filed by Bryant.

Estelle and *Boyde* in a footnote, but did not apply it.[13] Although the opinion is silent, "plain error" must have been the standard of review applied since the defendant failed to appropriately preserve the question for appellate review.

In *Montgomery*, the court cited *Estelle* and *Boyde* as the standard of review. 331 N.C. at 573, 417 S.E.2d at 750. However, the court essentially applied the statutory standard of review for alleged constitutional errors[14] and equated that standard of review to the *Estelle* and *Boyde* standard. *Id.* In *Montgomery*, the defendant had not properly objected to the jury instruction, but had requested that the pattern jury instruction be given. The court held that by requesting an instruction different from the one given, the defendant had complied with the "spirit" of the appellate rules. The Court therefore analyzed the instruction under the statutory "harmless beyond a reasonable doubt" standard. In a plurality opinion of no precedential weight, two members of the court found that the instruction violated *Cage* and that the State had failed to show the instruction was harmless beyond a reasonable doubt. In equating North Carolina's statutory standard of review to *Estelle* and *Boyde*, the court stated that

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[13] *See, Hudson*, 331 N.C. at 142 n.3, 415 S.E.2d at 743 n.3.

[14] N.C.G.S. § 15A-1443(b)(1989)("Existence and showing of prejudice." "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.").

one of its prior opinions supported no different conclusion, but admitted that the question of the standard of review was not before them there. *Id.*, *citing*, *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335 (1983), *cert. denied*, 464 U.S. 865 (1983). *Montgomery* left the State nowhere on the question of the standard of review in North Carolina for alleged constitutionally infirm jury instructions.

In *Bryant*, one of the cases at bar, the State again argued the standard of review. Bryant had failed to object to the jury instruction (or to request a different one) and, in light of the court's confusion on what standard of review it should apply, the State argued "plain error."[15] Believing it was following a mandate from this Court in *Sullivan*, the North Carolina Supreme Court summarily rejected the State's "plain error" argument and held, without analysis of the evidence in the trial record, that "convicting a person of first degree murder in violation of *Cage* [met] the test of plain error." *Bryant*, 334 N.C. at 340, 432 S.E.2d at 295. The Court made no mention of the correct standard of review in *Estelle* and *Boyde*. The court thus applied an improper standard of review and, in so doing, precluded the State from showing that there was no reasonable likelihood that the jury

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[15] "Plain error" is defined and the standard set forth in *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983), *quoting*, *United States v. McCaskill*, 676 F.2d 995 (4th Cir. 1982); *See*, *Byrant*, 334 N.C. at 339-340, 432 S.E.2d at 295. The State similarly argued the *Estelle* and *Boyde* standard of review and plain error in *Williams*, the second case at bar, but the court summarily rejected the issue, with no analysis, in light of *Bryant*. *Williams*, 334 N.C. at 447, 434 S.E.2d at 592.

applied the instruction in a way that violated the Constitution.[16]

Sullivan only barred a "harmless error" analysis for *Cage* violations. The question of whether a constitutionally infirm jury instruction on reasonable doubt could survive analysis under the *Boyde* standard of review was left open. As this Court stated in *Sullivan*, ___ U.S. at ___, 113 S.Ct. at 2081, the question is "whether the guilty verdict was surely unattributable to the error." Here, an examination of the entire charge and record to determine whether there was not a "reasonable likelihood" that the jury understood the charge to create an unconstitutional presumption, *Cupp*, 414 U.S. at 147, was not provided the State by the court's application of an improper standard of review.

A short form version of North Carolina's "plain error" rule is found in the dissent in *Montgomery* where it is stated that "[b]efore deciding that an error by the trial court amounts to 'plain error', the reviewing court must be convinced that absent the error, the jury probably would have reached a different verdict." 331 N.C. at 579, 417 S.E.2d at 754, *citing*, *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986). Or, as is often stated, "the error in question 'tilted the scales' and caused the jury to convict the defendant." *Walker*, 316 N.C. at 39, 340 S.E.2d at 83, *citing*, *State v.*

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[16] To date, at least one other jurisdiction, Louisiana, has taken an equally extreme view of *Sullivan*. *See*, *State v. Berniard*, ___ So.2d ___, 1993 WL 382152 (La. App. 4 Cir. 1993); *State v. Berniard*, ___ So.2d ___, 1993 WL 302687 (La. App. 4 Cir. 1993).

Black, 308 N.C. 736, 303 S.E.2d 804 (1983). These, or any other, standards of review which are inconsistent with *Boyde* and preclude, as here, a determination of whether there was a "reasonable likelihood" that the jury applied the instruction in an improper way are violative of this Court's opinions. Therefore, this case presents this Court with the perfect opportunity to answer the important federal question regarding the standard of review for alleged *Cage* violations.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that a writ of certiorari issue to review the decision of the North Carolina Supreme Court.

In the alternative, the Petitioner respectfully requests that these cases be held pending this Court's decision in *People v. Sandoval*, 14 Cal. Rptr. 2d 342, 841 P.2d 862, *cert. granted in part*, ___ U.S. ___, 1993 WL 232901 (1993).

Respectfully submitted,

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November 16, 1993

APPENDIX

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IN THE SUPREME COURT OF NORTH CAROLINA

FILED
July 30, 1993

STATE OF NORTH CAROLINA	)	
	)	
V.	)	No. 166A91 - Edgecombe
	)	
KENNETH MICHAEL BRYANT	)	

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Brown, J., at the 2 October 1990 Criminal Session of Superior Court, Edgecombe County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 16 February 1993.

Lacy H. Thornburg, Attorney General, by Jeffrey P. Gray, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Janine M. Crawley, Assistant Appellate Defender, for defendant-appellant.

FRYE, Justice.

On 30 April 1990, an Edgecombe County grand jury indicted defendant for the murder of Roy Gene Ackery (the victim). Defendant was tried non-capitally and found guilty of first-degree murder. On 5 October 1990, a judgment was entered sentencing defendant to life imprisonment. From this judgment defendant appeals to this Court.

Defendant brings forward seven issues on appeal. However, we find it necessary to address only two of those issues since defendant is entitled to a new trial.

In defendant's first argument, he contends that the trial court erred by refusing to grant his motion to dismiss at the close of all the evidence. He contends that his conviction must be vacated because the State's evidence was insufficient to convict him of first-degree murder.

When ruling on a motion to dismiss, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence. State v. Sweatt, 333 N.C. 407, 414, 427 S.E.2d 112, 116 (1993). "The test that the trial court must apply is whether there is substantial evidence -- either direct, circumstantial, or both -- to support a finding that the crime charged has been committed and that defendant was the perpetrator." Id. (quoting State v. Clark, 325 N.C. 677, 682, 386 S.E.2d 191, 194 (1989)). The term "substantial evidence" means "the evidence must be existing and real, not just seeming or imaginary." Clark, 325 N.C. at 682, 386 S.E.2d at 194. When there is substantial evidence of each element of the crime charged and that the defendant was the perpetrator, then a motion to dismiss should be denied. Id.

The evidence taken in the light most favorable to the State tends to show the following facts and circumstances. Defendant was living and working in Jackson, Mississippi, in December 1989. His estranged wife, Doris Jones Bryant,

was living with the victim in a mobile home on Highway 43 across from the Hitching Post, a bar in Edgecombe County, North Carolina.

Cheryl Marlowe, who had dated defendant sporadically for over three years, testified at trial, under a grant of immunity, that on 30 December 1989 she and defendant went to the Good Tymes bar in Rocky Mount where they drank beer and shot pool. They left the bar at approximately 9:30 p.m. and drove around Nash and Edgecombe Counties. At approximately 10:30 p.m., defendant told Ms. Marlowe to let him out of the car. Marlowe stopped at a stop sign located at the intersection of a rural paved road and Highway 43 near the victim's mobile home and the Hitching Post. Defendant instructed Ms. Marlowe to continue driving down the road for a while then return to pick him up after approximately five minutes. Marlowe testified that prior to getting out of the car, defendant reached under the seat. She did not see him get anything from under the seat, but she knew that he had placed a gun there earlier. Once defendant was out of the car, Marlowe drove further down the road and relieved herself in a patch of trees. She then made a U-turn and returned to the stop sign to pick up defendant. When defendant entered the car, he told Marlowe that neither his estranged wife nor the victim was at home. Marlowe drove defendant to his sister's house, but she was not at home. During the drive back to Wilson from defendant's sister's house, defendant removed a gun from under the seat, unloaded it and threw a shell out of the window. Defendant then told Marlowe that when he arrived at the victim's

mobile home, he knocked on the window, the victim looked through the blinds, and both men grabbed for the door knob. Defendant then fired his gun through the door.

Marlowe had been interviewed three times prior to the trial. Her version of what happened on the night of the murder varied in each of her statements, however she explained that the variations were due to the fact that her husband was present in her home during the second interview, she was afraid of defendant, and she was afraid of losing her children if she became involved. Marlowe testified that she had said some things which were true and she had said some things which were not true, but her testimony before the court was the truth.

Charles Myers also testified for the State. Myers testified that at approximately 10:00 p.m. or 10:30 p.m. on the night of the murder he was standing outside of the Hitching Post. He heard the sound of a gun shot come from the victim's mobile home and within forty or forty-five seconds defendant ran past him. Myers stated that prior to the murder he did not know defendant's name, but he had seen defendant "around town."

Richard Hopkins testified that on the night of the murder defendant asked him how long it had been since he had seen the victim. Hopkins responded that it had been about two days. Defendant then pulled out a barber's razor and said, "[w]ell, I got something for him when I see him."

Doris Bryant, defendant's estranged wife, testified that in April, 1989, defendant kicked open the door of her

apartment at midnight and told her that he would "kill [the victim]" and "he'd kill [her], too." Doris Bryant also testified that when she returned to the victim's mobile home between 10:30 p.m. and 10:40 p.m. on the night of his murder, she discovered the victim's body lying against the mobile home door.

James Adcock, a paramedic, testified that when he arrived at the victim's mobile home, the victim did not have a pulse, nor was he breathing. Adcock observed a gun shot wound to the right temple of the victim's head, and was of the opinion that the victim was dead upon Adcock's arrival at the scene.

Defendant did not testify at trial, but he presented witnesses to establish an alibi defense. Defendant called as witnesses, his brother-in-law, his brother's girlfriend, his sister's boyfriend and his three sisters. All of defendant's witnesses testified that defendant was in their presence on 30 December 1989 at approximately 10:30 p.m. playing cards.

Notwithstanding the evidence stated above, defendant specifically argues that the evidence was insufficient to convict him of murder in the first degree for the following reasons: 1) the State presented scant physical evidence; 2) the inconsistency between an admission by defendant and the physical evidence; 3) an inherently unreliable identification of defendant by a State's witness; 4) the State produced no evidence which placed defendant at the crime scene at the time of the shooting; 5) the alleged threats which defendant made against the victim were vague, and most were made

while defendant was under the influence of alcohol; 6) the state produced no evidence that defendant fled the area; and 7) the lack of further evidence regarding observations by a witness of a possible larceny following the murder.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. State v. McAvoy, 331 N.C. 583, 589, 417 S.E.2d 489, 494 (1992). Defendant does not contend that the evidence is insufficient to prove a specific element of the offense of first-degree murder. Rather, he attacks what he perceives as a general weakness in the State's case for the seven reasons submitted. We conclude that the evidence presented by the State was sufficient to withstand the motion to dismiss and to take the case to the jury.

Where there is substantial evidence of each element of the offense charged -- as here -- the fact that there was "scant" physical evidence, or inconsistencies in the evidence, is for the jury's consideration. See State v. Earnhardt, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). In addition, "the credibility of the witness' identification and the weight given his testimony is a matter for the jury to decide." State v. Turner, 305 N.C. 356, 362, 289 S.E.2d 368, 372 (citing State v. Greene, 296 N.C. 183, 250 S.E.2d 197 (1978)); State v. Orr, 260 N.C. 177, 132 S.E.2d 334 (1963); State v.Bowerman, 232 N.C. 374, 61 S.E.2d 107 (1950). This Court recognizes an exception to this rule when the witness' testimony is "inherently incredible." State v. Miller, 270 N.C. 726, 154 S.E.2d 902 (1967) (witness, who had never seen defendant before, identified him at scene of crime, at

night, and at a distance of 286 feet). However, in the instant case, the witness, Charles Myers, had seen defendant before and was standing in a lighted parking lot when defendant came running past him some eight to ten feet away. Myers gave a description of defendant on the same night to a deputy sheriff, picked defendant out of a photographic lineup, and identified defendant at trial as the man he saw running past him through the parking lot.

Contrary to defendant's contentions, the State did produce evidence placing him at the crime scene at the time of the shooting. Charles Myers' testimony that he heard the sound of a shot coming from the victim's trailer around 10:00 p.m or 10:30 p.m. and saw defendant running past him some forty or forty-five seconds later is sufficient to raise an inference that defendant was at the mobile home at the time of the shooting. As for defendant's argument that his threats were vague and made while he was under the influence of alcohol, we do not find this to be fatal to the State's case. Assuming, arguendo, defendant's threats were vague and made while he was intoxicated, this would simply be another factor to be considered by the jury in determining whether defendant was guilty of premeditated and deliberate murder. Finally, there is no requirement that the State produce evidence of flight in a first-degree murder case, nor is there any requirement that the State probe into a possible defense theory such as the murder being in conjunction with a larceny.

The evidence in the present case, taken in the light most favorable to the State, was clearly sufficient to support

a finding that defendant intentionally shot and killed the victim with malice, premeditation and deliberation. Thus, the trial court did not err in refusing to grant defendant's motion to dismiss. This argument is rejected.

The only other issue which we must address is defendant's contention that the trial court erred by giving reasonable doubt instruction that reduced the State's burden of proof below the standard mandated by the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution. The trial court instructed the jury in pertinent part as follows:

> When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or satisfied to a moral certainty of the truth of the charge.
>
> If, after considering, comparing and weighing all the evidence, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt; otherwise not.
>
> A reasonable doubt, as that term is employed in the administration of criminal law, is an honest substantial misgiving generated by the insufficiency of the proof.

(Emphasis added.) Defendant argues that he is entitled to a new trial because the trial court committed constitutional error by giving the above instruction on reasonable doubt which was identical in pertinent respects to an instruction found unconstitutional in Cage v. Louisiana, 498 U.S. 39, 112 L. Ed. 2d 339 (1991). See also Sullivan v. Louisiana, --- U.S. ---, 124 L. Ed. 2d 182 (1993) (Cage error is reversible error per se and not subject to harmless error analysis).

The State argues that since defendant did not object at trial to the reasonable doubt instruction, the alleged infirmity in the instruction must be addressed in terms of "plain error." The "plain error" rule was set forth by this Court in State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983) as follows:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "'resulted in a miscarriage of justice or in the denial to appellant of a fair trial'" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly

> said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."
>
> United States v. McCaskill, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted (emphasis in original).

Id. at 660, 300 S.E.2d 378.

Cage error is fundamental error. A jury verdict rendered in violation of Cage is not a jury verdict within the meaning of the Sixth Amendment. Sullivan v. Louisiana, --- U.S. at ---, 124 L. Ed. 2d at 188. Clearly, convicting a person of first-degree murder in violation of Cage meets the test of plain error.

In Cage, the United States Supreme Court held that the reasonable doubt instruction used in the defendant's trial was constitutionally defective. The instruction was as follows:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible

> substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

State v. Cage, 498 U.S. at 40, 112 L. Ed. 2d at 341-42.

This Court addressed reasonable doubt instructions in light of Cage in two recent cases, State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992), and State v. Montgomery, 331 N.C. 559, 417 S.E.2d 742 (1992). In Hudson, the Court upheld the reasonable doubt jury instruction. However, the reasonable doubt instruction in Hudson did not contain any of the three terms, "grave uncertainty," "actual substantial doubt," or "moral certainty," which were condemned in Cage. Id. at 142-43, 415 S.E.2d at 742-43. We concluded that the jury could not have been misled by the reasonable doubt instruction. Id.

In State v. Montgomery, 331 N.C. 559, 417 S.E.2d 742 (1992), five Justices concurred in awarding the defendant a new trial. However, only two Justices in the majority reached the issue of the constitutionality of the reasonable doubt instruction. Thus, we do not consider the opinion in Montgomery as binding precedent from this Court on the

constitutionality of the reasonable doubt instruction. The instruction reviewed in Montgomery was in pertinent part:

> Members of the jury, a reasonable doubt, or at least a definition of that [sic] is acceptable by our Supreme Court, is that it is not a vain, imaginary or fanciful doubt, but rather is one based upon sanity or saneness and rationality. And when it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it means that you must be fully satisfied or entirely convinced or satisfied to a moral certainty of the truth of the charge, and after considering and comparing and weighing all the evidence, or the lack of the evidence, as the case may be, if your minds are left in such condition that you cannot say that you have abiding faith to a moral certainty of the defendant's guilt of one or more or all of those charges, then under those circumstances, you have a reasonable doubt. Otherwise, you do not.
>
> A reasonable doubt, as that term is employed in the administration of criminal law, is an honest, substantial misgiving, one generated by the insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused.

Two members of the Court held that "the use of the terms 'substantial misgiving' and 'moral certainty' in combination in the trial court's reasonable doubt instruction violated the requirements of the Due Process Clause as interpreted by the Supreme Court in Cage." Id. at 522, 417 S.E.2d at 749-50. The trial court in Montgomery joined its definition of a reasonable doubt, an "honest, substantial misgiving," with a requirement that, to convict the defendant, the jury must be convinced to a "moral certainty" rather than to an evidentiary certainty. Id. at 573, 415 S.E.2d at 742. Two members of this Court concluded that while the instruction in Montgomery was "not identical to the instruction held unconstitutional in Cage, the trial court used a combination of terms so similar to the combination disapproved in Cage that there is a 'reasonable likelihood' that the jury applied the challenged instruction in a way that violated the Due Process Clause." Id. The instruction in the instant case is essentially identical to the one in Montgomery. We now hold that the reasonable doubt instruction used by the trial court in the instant case also violates Cage.

The United States Supreme Court in Cage took note of the fact that the Louisiana Supreme Court had upheld the reasonable doubt instruction in Cage notwithstanding the use of the phrases "grave uncertainty" and "moral certainty" on the grounds that, taking the charge as a whole, reasonable persons of ordinary intelligence would understand the definition of reasonable doubt. However, the United States Supreme Court rejected this view noting:

> The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Cage, 498 U.S. at 41, 112 L. Ed. 2d at 342.

We believe the crucial term in the reasonable doubt instruction condemned by the United States Supreme Court in Cage is "moral certainty." The correct standard for conviction beyond a reasonable doubt is evidentiary certainty rather than moral certainty.

A moral certainty may exist when a thing is "probable though not proved." Webster's Ninth Collegiate Dictionary 771 (9th ed. 1991). A moral certainty may exist when something is "based upon strong likelihood or firm conviction, rather than upon the actual evidence or

demonstration." The American Heritage Dictionary 852 (1979). The role of the jury is to determine the truth as to whether the defendant is guilty of the crime charged or some lesser included offense thereof. Truth is "conformity to knowledge, fact, actuality, or logic," while the word moral is "concerned with the judgment of the goodness or badness of human action and character." Id. at 1378.

A jury instruction which emphasizes what is good or bad -- a moral judgment, rather than truth -- an evidentiary judgment, is inconsistent with the role of the jury in deciding the guilt or innocence of the defendant. When a jury is instructed that it may convict if it finds the defendant guilty to a moral certainty it increases the possibility that a jury may convict a person because the jury believes he is morally guilty without regard to the sufficiency of the evidence presented at trial to prove his guilt. Thus, when reasonable doubt is defined in terms of "grave uncertainty," "actual substantial doubt," or in terms which suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard, and the jury is then told that what is required for conviction is moral certainty of the truth of the charge, the instruction will not pass muster under Cage.

In the instant case, the jury was instructed that a "reasonable doubt . . . is an honest substantial misgiving generated by the insufficiency of the proof." The term "honest substantial misgiving" is modified by the additional phrase, "generated by the insufficiency of the proof," thus referring the jurors back to an evidentiary standard. However, the jurors were also told that they could find

defendant guilty if they were "satisfied to a moral certainty of the truth of the charge," and that they did not have a reasonable doubt if they had "an abiding faith to a moral certainty in the defendant's guilt." Thus, we find Cage error, entitling defendant to a new trial. Cage v. Louisiana, 498 U.S. 39, 112 L. Ed. 2d 339; Sullivan v. Louisiana, --- U.S. ---, 124 L. Ed. 2d 182.

NEW TRIAL.

No. 166A91 - State v. Bryant

Justice MEYER dissenting.

I dissent from the majority's decision to grant a new trial for Cage error essentially for the same reasons I expressed concerning that issue in my dissent in State v. Montgomery, 331 N.C. 559, 417 S.E.2d 742 (1992). Defendant here did not object to the reasonable doubt instruction given by the trial judge.

Cage does not dictate that we find reversible error in the instant case. In Cage, the Supreme Court found error in the Louisiana trial court's reasonable doubt instruction, stating:

> The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty, rather then evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based

> on a degree of proof below that required by the Due Process Clause.

Cage v. Louisiana, 498 U.S. 39, 41, 112 L. Ed. 2d 339, 342 (1990) (emphasis added).

In reading Cage broadly, the majority opinion deviates from the clear dictate of our own prior case law as well as from that of virtually every other appellate court in the land that has considered the matter. See Gaskins v. McKellar, ___ U.S. ___, 114 L. Ed. 2d 728 (Stevens, Jr., concurring in denial of writ of certiorari and acknowledging that Cage is to be read narrowly and emphasizing the critical import of the "grave uncertainty" language), reh'g denied, ___ U.S. ___, 115 L. Ed. 2d 1098 (1991); see also Ex parte White, 587 So. 2d 1236 (Ala. 1991) (finding permissible an instruction that failed to equate reasonable doubt with "grave uncertainty" and "actual substantial doubt" and that did not require jury to find guilt to a "moral certainty"), cert. denied, ___ U.S. ___, 117 L. Ed. 2d 142, reh'g denied, ___ U.S. 117 L. Ed. 2d 655 (1991); Smith v. State, 588 So. 2d 561 (Ala. Crim. App. 1991) (finding no error in use of terms "actual and substantial doubt" and "moral certainty"); Adams v. State, 587 So. 2d 1265 (Ala Crim. App. 1991) (finding permissible use of terms "actual and substantial dubt" and "moral certainty"); Fells v. State, 587 So. 2d 1061 (Ala. Crim. App. 1991) (finding use of term "moral certainty" to be proper); People v. Jennings, 53 Cal. 3d 334, 807 P.2d 1009, 279 Cal. Rptr. 780 (same), cert. denied, ___ U.S. ___, 116 L. Ed. 2d 462 (1991); Bradford v. State, 261 Ga. 833, 412 S.E.2d 534 (1992) (instruction permissible

when court used only "moral and reasonable certainty"); Potts v. State, 261 Ga. 716, 410 S.E.2d 89 (1991) (instruction permissible when court did not equate reasonable doubt with "grave uncertainty" or "actual substantial doubt"), cert. denied, ___ U.S. ___, 120 L. Ed. 2d 908, reh'g denied, ___ U.S. ___, 121 L. Ed. 2d 233 (1992); State v. Rhoades, 121 Idaho 63, 822 P.2d 960, 977 (1991) (Johnson, J., concurring) (instruction permissible with "actual doubt"), cert. denied, ___ U.S. ___, 122 L. Ed. 2d 119 (1993); Commonwealth v. Beldotti, 409 Mass. 553, 567 N.E.2d 1219 (1991) (instruction permissible with "moral certainty" language); State v. Bernard, 820 S.W.2d 674 (Mo. Ct. App. 1991) (instruction permissible where no Cage language used), rev'd on other grounds, 849 S.W.2d 10 (Mo. 1993) (en banc); State v. Morley, 239 Neb. 141, 474 N.W.2d 660 (1991) (instruction permissible when "moral uncertainty" and "actual and substantial doubt" used); Lee v. State, 107 Nev. 507, 813 P.2d 1010 (1991) (instruction permissible with "actual and substantial doubt" language); Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991) (same); State v. Gonzalez, 822 P.2d 1214 (Utah 1991) (instruction proper when contains none of the language condemned in Cage).

In sum, I believe that the main opinion errs in its conclusion that the reasonable doubt instruction tendered by the trial curt was error requiring a new trial.

IN THE SUPREME COURT OF NORTH CAROLINA

FILED
September 10, 1993

STATE OF NORTH CAROLINA)
)
v.) No. 264A90 - Wayne
)
MARVIN EARL WILLIAMS, JR.)

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Butterfield, J., at the 30 April 1990 Criminal Session of Superior Court, Wayne County, upon a jury verdict of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his conviction of burglary by explosives was allowed by this Court on 13 August 1991. Heard in the Supreme Court 10 February 1992.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Linda Anne Morris, Assistant Attorney General, for the State.

William F.W. Massengale and Marilyn G. Ozer for defendant-appellant.

EXUM, Chief Justice.

After a trial in which he was convicted of the murder of Theron Price, of burglary with explosives and of attempted safe-cracking, defendant was sentenced to death.

He now raises numerous assignments of error spanning both the guilt-innocence and the sentencing phases of the trial. We find one of these meritorious and therefore grant him a new trial.

I.

Defendant introduced no evidence at trial. The State's evidence tended to show the facts narrated below.

In the early morning of 12 February 1989, Lewis Rich, a security guard for Dewey Brothers, Inc., arrived at the company's premises for his 12:30 a.m. to 6:30 a.m. shift to find the guard- house gate locked. Unable to enter the premises or locate Theron Price, the guard he was scheduled to relieve, Rich telephoned Richard Helms, the company president. Helms arrived shortly and opened the gate. Helms found the door to the payroll office partially open, a light emanating from within, and just outside the office door an acetylene torch and a cart bearing oxygen and acetylene tanks. Helms then summoned the police. Inside the payroll office, the police observed a floor safe illuminated by a gooseneck lamp. There was carbon on the safe's hinges and knob. The police determined that the torch was improperly adjusted, that it would have created a lot of smoke and carbon but would not have cut metal.

Joining the police in a search of the rest of the premises, Helms discovered Theron Price. Lifeless, Price was lying on his back in the steel shed next to the payroll office, and had blood on his face and head. Parallel lines in the dirt indicated he had been dragged into the shed.

Various of his possessions, including his time clock, were nearby, as were a yellow hard hat and a welder's mask. The time clock, hard hat and welder's mask had blood on them. There were cracks in the fiberglass of the welder's mask, and, in the cracks, gray hairs. Also found on the scene were Reebok tennis shoe impressions leading to the building which housed the acetylene torches and related equipment. The lock on the cabinet where the torches were kept had been cut off.

Several days after the discovery of Price's body, an employee of Dewey Brothers named Angelo Farmer reported to his supervisors that he knew the identity of the killer. According to Farmer, he and defendant had discussed breaking into Dewey Brothers and robbing its safe in the early part of February. On 11 February, defendant asked Farmer whether he was "ready to move." When Farmer indicated that he was not, defendant said, "I'm gone. I'm on my move." The next day, after learning of Price's death, Farmer confronted defendant, saying: "Damn man. You killed a man." Defendant said he did not mean to do it. When Farmer remarked that defendant could have tied Price up, defendant replied that he had wanted to but "the man kept coming."

Having revealed this information, Farmer agreed to cooperate with the police. The police furnished him with a tape recording device. Wearing the device, Farmer engaged defendant in conversation about the crimes. During the conversation, defendant said he had tried to break into Dewey Brothers' safe using an acetylene torch he found on

the premises. When surprised by the watchman, he had pulled a knife but the guard had "kept coming." He had then taken the guard's time clock and hit him with it "two or three times." Defendant further stated: "I got scared then, but then I thought about the money. I kept checking on him and he had not come back to. I knew I had done killed the m----- f----- then." Defendant had continued to work on the safe and had checked on the guard more than once. When he heard a truck pull up, and later a car, defendant had attempted to wipe away his fingerprints and hide some of the evidence, and had then fled.

The police obtained a warrant based on Farmer's allegations and the tape recording and arrested defendant at a boarding house called the Salem Lodge. The police seized defendant's clothing and some of his possessions. The shoes he was wearing matched the footprints found at Dewey Brothers. Other than the shoes, however, the police obtained no physical evidence tending to link defendant to the crime scene.

An autopsy of the victim's body revealed several wounds on the face and head caused by blunt force trauma and a small laceration on each hand. The wounds on the face would have caused mild to moderate pain. The wounds on the face would have caused mild to moderate pain. The wounds on the head resulted in skull fractures and could have caused death. Two of these wounds would have required the force of a five-pound steel ball dropped from seven to twelve feet. The victim may have been conscious during the infliction of all the wounds, and for two to five minutes

thereafter, and may have been hit while lying on the ground. The victim probably lived for five to ten minutes after the fatal blows were struck.

Defendant was convicted of first-degree murder on theories of felony murder, the underlying felony being burglary with explosives, and premeditation and deliberation. He was also convicted of burglary with explosives and attempted safe-cracking. After a sentencing hearing, the jury recommended and the trial court imposed a sentence of death. The trial court also sentenced defendant to thirty years' imprisonment on the burglary conviction, but arrested the attempted safe-cracking judgment.

II.

Defendant contends, and we agree, that the trial judge gave the jury an unconstitutional instruction on the meaning of "reasonable doubt." The challenged instruction, given midway through the jury's deliberations in response to a juror's request for clarification, was taken almost verbatim from State v. Hammonds, 241 N.C. 226, 232, 85 S.E.2d 133, 138 (1954). The instruction stated:

> When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or to put it another way, satisfied to a moral certainty of the truth of the charge. If, after considering, comparing and weighing all the evidence, the minds of the jurors are left in such condition

> that they cannot say they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt, otherwise not. A reasonable doubt as that term is employed in the administration of criminal law, is a[n] honest substantial misgiving generated by the insufficiency of the proof, an insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused.

In the recent case of State v. Bryant, ___ N.C. ___, 432 S.E.2d 291, slip op. (No. 166A91, filed 30 July 1993), we held that the United States Supreme Court's decisions in Cage v. Louisiana, 498 U.S. 39, 112 L. Ed. 2d 339 (1990), and Sullivan v. Louisiana, 508 U.S. ___, 124 L. Ed. 2d 182 (1993), required us to declare an essentially identical instruction violative of the Due Process Clause of the Fourteenth Amendment and plain error warranting a new trial. Our decision in Bryant controls this issue and requires that we grant defendant a new trial.

III.

Though the instructional error is dispositive of this appeal, we must also discuss defendant's contention that the trial court should have dismissed the first-degree murder charge for insufficiency of the evidence. Were his contention correct, he would be shielded from further prosecution on this charge by the Double Jeopardy Clause of the United States Constitution. State v. Silhan, 302 N.C.

223, 267, 275 S.E.2d 450, 480 (1981). In addition, we will discuss those issues likely to arise again at defendant's next trial.

A

Defendant contends that the trial court erred in denying his motion to dismiss the first-degree murder charge since there was insufficient evidence of premeditation and deliberation. We disagree.

In measuring the sufficiency of the evidence, all evidence admitted, whether competent or incompetent, must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence and resolving in its favor any contradictions in the evidence. A motion to dismiss is properly denied if the evidence, when viewed in the above light, is such that a rational trier of fact could find beyond a reasonable doubt the existence of each element of the crime charged. State v. Brown, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984); State v. Sumpter, 318 N.C. 102, 107-08, 347 S.E.2d 396, 399 (1986).

A killing is "premeditated" if the defendant contemplated killing for some period of time, however short, before he acted. It is "deliberate" if the defendant acted "in a cool state of blood," free from any "violent passion suddenly aroused by some lawful or just cause or legal provocation." State v. Fields, 315 N.C. 191, 200, 337 S.E.2d 518, 524 (1985) (quoting State v. Lowery, 309 N.C. 763, 768, 309 S.E.2d 232, 237 (1983)). The defendant need

not have been placid or unemotional. Rather, whatever passion he felt must not have been such as to overwhelm his faculties and reason. State v. Williams, 308 N.C. 47, 68, 301 S.E.2d 335, 348-49, cert. denied, 464 U.S. 865, 78 L. Ed. 2d 177, reh'g denied, 464 U.S. 865, 78 L. Ed. 2d 177 (1983).

Whether a killing was premeditated and deliberate may usually be answered only by resort to circumstantial evidence. State v. Williams, 308 N.C. at 68-69, 301 S.E.2d at 349. Among the circumstances generally considered probative on the point, the following are directly applicable to the facts of this case: 1) conduct of the defendant before and after the killing tending to show the requisite sate of mind, 2) the dealing of lethal blows after the deceased has been felled and rendered helpless, 3) that the killing was accomplished in a brutal manner and 4) a want of provocation on the part of the deceased. Id.

Viewed in the light most favorable to the State, the evidence was clearly sufficient to support a conclusion that the murder was premeditated and deliberate. First, defendant carried a knife with him during the attempted safe-cracking, indicating that he had anticipated a violent confrontation and the need for deadly force. Second, and most importantly, he struck the victim numerous times with a heavy object, causing at least three lethal injuries. Since a number of the blows would have rendered the victim unconscious, some of the lethal blows may have been inflicted while the victim was lying helpless on the ground. This evidence tends to show

a conscious decision on the part of defendant to ensure that his victim was dead.

Nor is there any evidence to show that defendant was provoked. Granted, he was surprised by the night watchman, but this fact alone does not justify a conclusion that he lost his capacity for rational thought. In fact, the evidence is all to the contrary. According to defendant himself, he had the presence of mind after felling the victim to resume his efforts to crack the safe and, when the police arrived, to hide various incriminating items and wipe his fingerprints from the scene before fleeing.

We conclude that the trial court did not err in denying defendant's motion to dismiss the first-degree murder charge.

This assignment of error is overruled.

B

Defendant next takes issue with the trial court's instruction to the jury that it could convict of first-degree murder if it found that the killing had occurred during the commission of a burglary with explosives. According to defendant, burglary with explosives is not a crime within the purview of the felony murder rule. Defendant did not object at trial. Therefore, were there error in this instruction, defendant would be entitled to no relief unless the error amounted to plain error. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983). We hold that the trial court did not commit error. The language of the burglary with explosives statute, the statute's history, and the rationale underlying the

felony murder rule, compel a conclusion that the legislature intended burglary with explosives to be one of the felonies upon which first-degree murder could be premised.

It is an elementary principle of statutory interpretation that, "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning." State v. Camp, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 Strong, N.C. Index 2d, Statutes § 5 (1968). Thus, we must begin our analysis with the language of the statutes in question. N.C.G.S. § 14-17 provides that a murder which occurs during the course of any "arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon" is punishable as first-degree murder. N.C.G.S. § 14-17 (Supp. 1992). (Emphasis added). N.C.G.S. § 14-57 reads as follows:

> Any person who, with intent to commit any felony or larceny therein, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by use of nitroglycerine, dynamite, gun-powder, or any other explosive, or acetylene torch, shall be deemed guilty of burglary with explosives.

N.C.G.S. § 14-57 (1986). (Emphasis added).

We note at the outset that the legislature denominated the crime of burglary with explosives a "burglary." The term "burglary" has a technical legal meaning, and we must presume that the legislature intended this meaning absent strong evidence to the contrary. As the Court stated in

Asbury v. Albermarle, 162 N.C. 247, 249-50, 78 S.E. 146, 148 (1913):

> [The] rule applicable to the construction of statutes is that when they make use of words of definite and well known sense in the law, they are to be received and expounded in the same sense in the statute. Adams v. Turrentine, 30 N.C. 149. In that case Chief Justice Ruffin says: 'Indeed, this rule is not confined to the construction of statutes, but extends to the interpretation of private instruments. There are exceptions to it, where it is seen that a word is used in a sense different from its proper one in instruments made by a person inops consilii. But that is a condition in which the Legislature cannot be supposed, and, therefore, although the intention of the Legislature, as collected from the whole act, is to prevail, a technical term having a settled legal sense, cannot be received in any other sense, unless at the last it be perfectly plain on the act itself what that other sense is.'

Nor is it "plain on the act itself" that the legislature intended the language of the burglary with explosives statute to be received in any but its technical sense. Burglary with explosives was unknown to the common law. United States v. Brandenburg, 144 F.2d 656, 663 (3rd Cir. 1944). Rather, it is a statutory crime, first defined in 1921 N.C. Sess. Laws, ch. 5, in language almost identical to that of the present statute. As noted by Brandenburg, the crime "bears little resemblance to the crime of burglary as defined at the common law." Id. at 662. Burglary, still a common law offense, is defined as a breaking and entering, in the nighttime, of the dwelling house of another, with intent to commit a felony therein. State v. Williams, 314 N.C. 337, 355, 333 S.E.2d 708, 720 (1985). By contrast, burglary with explosives is the breaking and entering, with intent to commit a felony therein, of any building, whether during the day or night, followed by the requisite opening of or attempt to open any secure place by the use of explosives.

Burglary with explosives, then, much more resembles a felonious breaking or entering, see N.C.G.S. § 14-54 (1986), than it does a burglary. This fact makes the legislature's choice of terminology especially significant. In 1921, the crime of breaking or entering was defined by statute as a breaking or entering "otherwise than by a burglarious breaking." N.C. Consol. Stat. § 4235 (1919) (emphasis added). We can only surmise that the legislature, having defined the crime of burglary with explosives in terms almost identical to those of breaking or entering, denominated the crime a "burglary" in order to distinguish it from breaking or entering. That the legislature intended an

important distinction between the two crimes is further evidenced by its provision that the crime of burglary "shall be punished as for burglary in the second degree." 1921 N.C. Sess. Laws, ch. 5, § 2. Burglary in the second-degree was then punishable by imprisonment "for life, or for a term of years." N.C. Consol. Stat. § 4233. Breaking or entering otherwise than burglariously was punishable by imprisonment for "not less than four months nor more than ten years." N.C. Consol. Stat. § 4235.

Thus, both the language of the statute and its history support a conclusion that the legislature intended burglary with explosives to be considered a species of "burglary." If it is a "burglary," then burglary with explosives must be within the purview of N.C.G.S. § 14-17.

Nor does this conclusion do violence to the rationale of the felony murder rule. Indeed, like the other felonies enumerated in N.C.G.S. § 14-17--arson, rape, robbery, kidnapping and burglary--the crime of burglary with explosives is inherently dangerous to human life. Using explosives is a highly dangerous activity under the best of circumstances. See Sales Co. v. Board of Transportation, 292 N.C. 437, 442, 233 S.E.2d 569, 572 (1977) (blasting with explosives considered "ultrahazardous activity"). When done inside a building, and without warning to the occupants of the building, or to those who may be nearby, the risk to human life is only multiplied. We can readily conclude that the legislature considered this crime as inherently dangerous as simple "burglary" and therefore deserving of the highest penalty when its commission results in death.

We hold that the crime of burglary with explosives, as defined by N.C.G.S. § 14-57, is a "burglary" within the purview of the felony murder statute. Therefore, the trial court did not err in instructing the jury on felony murder.

This assignment of error is overruled.

C

Defendant next contends that he was denied the right to represent himself. Based on the record summarized below, we find that defendant did not request to proceed pro se with sufficient clarity. Because the right was not properly asserted, it cannot have been infringed.

On the afternoon of the fourth day of jury selection, defendant informed the judge that he was dissatisfied with his court-appointed counsel, Messrs. Jordan and Braswell. Defendant indicated that his lawyers had not adequately communicated with him about the details of his case, and had failed to provide him with the information (including legal texts) he needed to help defend himself. He also suggested that his case should have been moved to another venue because of negative pretrial publicity. The judge responded that defendant's lawyers were perfectly capable and that it would be impractical at this late stage of the proceedings to substitute other counsel. According to the judge, defendant had only two options. He could either continue with Messrs. Jordan and Braswell, or represent himself. When asked if he wanted to represent himself, defendant answered, "No, sir." The judge reiterated that defendant's lawyers would provide

an "adequate defense," and then questioned the lawyers about their representation of defendant.

After his lawyers had spoken, defendant again addressed the court. He said, "You stated that, that there is no other way that I could have no other lawyers . . . But what if I choose to represent myself?" The judge responded that he would consider defendant's request and proceed to question him at great length regarding his ability to conduct his own defense. Specifically, the judge asked whether defendant was taking drugs or medication, how much schooling he had completed, what his grades had been and whether he had ever studied law. The judge then advised defendant that, given his lack of legal training, he would be at a grave disadvantage in attempting to represent himself against a prosecutor with 25 years experience. The judge concluded by asking defendant whether he still wished to represent himself. Defendant responded: "I choose to represent myself." The judge did not rule on defendant's request, but instead adjourned the court so that he could consider the issue for the rest of the afternoon.

The judge opened the next session with another lecture on the dangers of self-representation. The judge reminded defendant that he faced a number of serious charges, including one for first degree murder, and that he risked receiving the death penalty. The judge then asked defendant again whether he still wanted to represent himself. Defendant responded, "I chose to represent myself." At this, the judge took a brief recess and then renewed his questioning regarding defendant's ability to represent

himself. This time the judge went into greater depth regarding defendant's education and grades, and also asked about defendant's age, IQ, public speaking ability and previous experience in representing himself. The following exchange then occurred.

> MR. WILLIAMS: I understand the situation that I have chosen to represent myself. It is not that I would like to represent myself but if I could get a full new complete set of lawyers representing me and I would feel fair with that representation. I would like to continue on with my trial if I was able to receive things that I am entitled to have concerning my trial or evidence that is brought up against me and so on, state witnesses and so on.
>
> THE COURT: You are saying that if your lawyers would furnish to you everything that you ask for--
>
> MR. WILLIAMS: Concerning my trial.
>
> THE COURT: Then you would be willing to let them stay on your case?
>
> MR. WILLIAMS: Yes, sir.

The discussion then turned to the materials defendant wished to receive. The judge assured defendant that he would order the lawyers to furnish defendant with everything he required, and then said: "Let's try it for a few days and see how things go. I don't want you to represent yourself. I just

don't--I think that would be unfair." Defendant did not appear reassured. When asked what was on his mind, defendant responded, "I was thinking of I want to get the right representation from my lawyers concerning this matter." The judge then indicated that he would require defendant's lawyers to stay on the case, and denied defendant's motion "to represent himself in the trial of this case," citing the following factors: 1) that defendant was charged with serious crimes for which he could receive the death penalty or life imprisonment, 2) that defendant was twenty-eight years old and had completed only 10 years of education, 3) that defendant had an IQ of 78, "borderline range of intellectual functioning," 4) that Messrs. Braswell and Jordan were competent, experienced attorneys, and 5) that defendant had no access to "law books" in prison and was incapable of retaining a private attorney. The judge concluded "as a matter of law" that defendant was "incapable of adequately representing himself in the trial of his case."

At the outset, we note that the trial court based its ruling on erroneous grounds. A defendant's right to represent himself, guaranteed in state criminal proceedings by the Sixth and Fourteenth Amendments of the United States Constitution,[17] does not depend on his ability to present an effective defense. Faretta v. California, 422 U.S.

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[17] In North Carolina, the right of self-representation is also guaranteed by Article I, Section 23 of the North Carolina Constitution, State v. Mems, 281 N.C. 658, 670-72, 190 S.E.2d 164, 172-73 (1972), and by statute, N.C.G.S. § 15A-1242.

806, 834, 45 L. Ed. 2d 562, 581 (1975). The right protects individual free choice and therefore must be honored even though its exercise may undermine the objective fairness of a proceeding. As stated in Faretta, "although [the defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the life-blood of the law.'" Id. (quoting Illinois v. Allen, 397 U.S. 337, 350-51, 25 L. Ed. 2d 353, 363 (Brennan, J., concurring) (1970)). Under Faretta, a defendant who clearly elects to represent himself must be permitted to do so upon the sole condition that he make a knowing and voluntary waiver of the right to counsel. Id. at 835, 45 L. Ed. 2d at 581-82. Nor does a defendant need the skill of a lawyer to knowingly waive counsel. Such a waiver will be found if the defendant has been made aware of the benefits of counsel and understands the consequences of foregoing those benefits. Id.; see also N.C.G.S. § 15A-1242.

Despite the trial court's erroneous reasoning, we find no error in its ruling since Mr. Williams never clearly asserted his right to proceed pro se. Unlike the right to counsel, the Faretta right does not arise until asserted. Brown v. Wainwright, 665 F.2d 607, 610 (5th Cir. 1982). To properly assert the right, the defendant must "clearly and unequivocally" request to represent himself. Faretta, 422 U.S. at 835, 45 L. Ed. 2d at 582; see also State v. Thomas, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992). As explained by the court in Meeks v. Craven, 482 F.2d 465 (9th Cir. 1973), this rule is required to prevent defendants from manipulating trial courts by recording an equivocal

request at trial and then arguing on appeal, as appropriate, either that they have been denied the right to represent themselves or that they did not make a knowing waiver and have therefore been denied the right to counsel. 482 F.2d at 467-68. To prevent such gamesmanship, we refuse to find an assertion of the Faretta right if the defendant's statements or actions create any ambiguity as to his desire to represent himself.

In Meeks, the seminal case on this issue, the defendant requested to proceed pro se in order to present a motion his counsel had advised against. The defendant was permitted to present his motion, after which the court asked him whether he wanted to continue representing himself. The defendant replied, "'Yes, Your Honor, I think I will.'" The Ninth Circuit held that Meeks had never asserted his right to represent himself because his conduct, viewed as a whole, indicated a desire only to present a single motion. The court reasoned further that the statement, "'I think I will,'" was a "prototype of equivocation." Id. at 467.

North Carolina courts have been equally strict in scrutinizing alleged requests to proceed pro se. This Court has held on many occasions that a mere request to substitute counsel is insufficient to assert the Faretta right. See, inter alia, State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975), cert. denied, 433 U.S. 907, 53 L. Ed. 2d 1091 (1977), overruled on other grounds by State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1984); State v. Cole, 293 N.C. 328, 237 S.E.2d 814 (1977); and State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981). Similarly, this Court has held that

a request to participate with court-appointed counsel in conducting the trial does not constitute a clear and unequivocal request to proceed pro se. State v. Thomas, 331 N.C., 671, 417 S.E.2d 473 (1992). And, like the Ninth Circuit, we have refused to find an assertion of the Faretta right, despite a defendant's request to proceed without counsel, where the defendant's contemporaneous statements made that request ambiguous. State v. McGuire, 297 N.C. 69, 254 S.E.2d 165, cert. denied, 444 U.S. 943, 62 L. Ed. 2d 310 (1979); see also State v. Gerald, 304 N.C. 511, 284 S.E.2d 312 (1981).

In McGuire, defendant indicated at his arraignment hearing that he wanted the trial court to appoint him a new lawyer because he could not agree with his present one. Defendant added, "'I am asking the court to let me defend myself in these cases.'" When the trial court refused to appoint new counsel, defendant repeated, "'I am asking for another attorney.'" Thereafter, defendant reconciled with his attorney and specifically consented to his representation. On appeal, this Court held that, despite defendant's one request to represent himself, his statements and conduct viewed as a whole evinced only a desire for new counsel. Thus, defendant had "never 'clearly and unequivocally' asserted his desire to conduct a pro se defense." 297 N.C. at 82-83, 254 S.E.2d at 173-74.

We believe the case at bar is properly analogized to McGuire. As in McGuire, defendant at one point requested to proceed pro se. But when this request is viewed in the context of his other statements, it is apparent that defendant's

primary desire was to ensure adequate representation by counsel, and that he never took a firm position on whether to proceed pro se.

When first addressing the trial judge, defendant expressed concern that his attorneys were not communicating with him adequately, and requested substitute counsel. When informed that he would not be permitted new counsel, and that his only options were to continue with present counsel or proceed pro se, defendant initially declined to represent himself. Soon thereafter, he changed his mind. Thus, defendant vacillated from the beginning.

That defendant still wished to be represented by counsel, despite his request to proceed pro se, is apparent from his statement the next day:

> I understand the situation that I have chosen to represent myself. It is not that I would like to represent myself but I could get a full new complete set of lawyers representing me and I would feel fair with that representation. I would like to continue on with my trial if I was able to receive things that I am entitled to have concerning my trial or evidence that is brought up against me and so on, state witnesses and so on.

Thereafter, defendant specifically agreed to continue with present counsel on the trial judge's assurance that he would be provided with all the information he required. Tellingly, defendant never again requested to proceed pro se. Though

he did reiterate his concern that he receive "the right representation from my lawyers," this statement merely confirms the fact that he wished to be represented by counsel.

We therefore hold that defendant was not denied his right to represent himself at trial because he never asserted that right "clearly and unequivocally." We are reassured in so holding by the knowledge that, had defendant been permitted to represent himself based on his equivocal requests, he would now be arguing with some justification that he was denied the right to counsel. We refuse to place trial courts "in a position to be whipsawed by defendants clever enough to record an equivocal request to proceed without counsel in the expectation of a guaranteed error no matter which way the trial court rules." Meeks, 482 F.2d at 468.

This assignment of error is overruled.

D

Defendant assigns error to certain of the trial court's evidentiary rulings. Specifically, he argues that the trial court erred in admitting a tape recording allegedly containing admissions by defendant, in admitting gory pictures of the victim and in admitting evidence seized at defendant's residence.

The prosecution introduced over defendant's objection a tape recording allegedly containing an admission by defendant that he killed Theron Price. Defendant argues that

the recording should not have been admitted because it was largely inaudible. He says he was prejudiced by this error in that the prosecutor and Angelo Farmer, the government witness who made the recording, were permitted to interpret the tape for the jury, putting words in defendant's mouth that the jurors could not have heard themselves. We believe the tape was properly admitted.

At the voir dire hearing held to determine admissibility, Angelo Farmer testified to having engaged defendant in conversation about the killing while wearing a concealed tape recording device. The trial court listened to the tape recording twice, once with a transcript prepared by a police officer, and once without the transcript, and found the recording admissible. In its findings of fact and conclusions of law, the court noted that "the tape recording is inaudible and unintelligible in many respects but there are sporadic portions that are audible and intelligible and could be enlightening to the jury."

North Carolina courts have long recognized that a tape recording may be excluded if inaudible. The rule was first articulated in State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971), where we held that a trial court may not admit a tape recording without first conducting a voir dire, out of the presence of the jury, to determine whether the recording is "'sufficiently audible, intelligible, not obviously fragmented . . . .'" 279 N.C. at 17, 181 S.E.2d at 571 (quoting State v. Driver, 38 N.J. 255, 288, 183 A. 2d 655, 672 (1962)). Numerous subsequent cases have cited with approval the language in Lynch requiring that a tape record-

ing be sufficiently audible. See, e.g., State v. Gibson, 333 N.C. 29, 41, 424 S.E.2d 95, 102 (1992), overruled on other grounds by State v. Lynch, ___ N.C. ___, 432 S.E.2d 349, slip op. (No. 87A92, filed 30 July 1993); State v. Shook, 55 N.C. App. 364, 366-67, 285 S.E.2d 328, 329 (1982); and State v. Jeeter, 32 N.C. App. 131, 133, 230 S.E.2d 783, 785, disc. review denied, 292 N.C. 268, 233 S.E.2d 394 (1977); cf. State v. Hammette, 58 N.C. App. 587, 590, 293 S.E.2d 824, 826 (1982) (inaudible tape recording not inadmissible "unless defects are so substantial as to leave the recording without probative value or to render the recording as a whole untrustworthy"); and Searcy v. Justice, 20 N.C. App. 559, 565, 202 S.E.2d 314, 317-18, cert. denied, 285 N.C. 235, 204 S.E.2d 25 (1974) ("a tape recording should not be excluded merely because parts of it are inaudible if there are other parts that can be heard").

Forsaking this line of authority, defendant relies instead on a related, but obsolete, holding of Lynch. Lynch not only created the voir dire rule discussed above, but also established detailed standards for authenticating tape recordings. State v. Stager, 329 N.C. 278, 316-17, 406 S.E.2d 876, 898 (1991). Defendant relies on the latter aspect of Lynch, and thus presents his inaudibility claim in improper authentication clothing. Under Lynch, the proponent of a tape recording was required to show:

> 1) that the recorded testimony was legally obtained and otherwise competent;

2) that the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded;

3) that the operator was competent and operated the machine properly;

4) the identity of the recorded voices;

5) the accuracy and authenticity of the recording;

6) that defendant's entire statement was recorded and no changes, additions, or deletions have since been made; and

7) the custody and manner in which the recording has been preserved since it was made.

279 N.C. at 17, 181 S.E.2d at 571. Defendant asserts that this test, which he considers binding despite the 1984 adoption of the North Carolina Rules of Evidence, was not met in the case at bar. Specifically, he argues that the trial court failed to make findings of fact as to items 1) through 3). He contends further that the State could not have proven items 2) and 3) because the tape was inaudible.

As the State correctly points out, the seven-prong Lynch test has been superseded by the authentication requirements of Rule 901. Stager, 329 N.C. at 317, 406 S.E.2d at 898. Under Rule 901, authentication is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C.G.S. § 8C-1,

Rule 901 (1992). The State provided such evidence in the form of testimony by Angelo Farmer that the tape was a true recording of his conversation with defendant. Thus, the tape recording was properly authenticated, and the trial court did not err in failing to make findings of fact in accordance with the Lynch test.

Holding that the tape recording was properly authenticated does not, however, answer defendant's contention that the tape was too inaudible to be admissible. Under Stager, authentication is not the only prerequisite to the admissibility of a tape recording. A tape must also be shown to have been legally obtained and to contain "otherwise competent evidence." Stager, 329 N.C. at 317, 406 S.E.2d at 898. Under the first holding of Lynch, and the cases citing it, a tape recording which is not "sufficiently audible" cannot be considered competent evidence.

Whether a tape recording is sufficiently audible to be admitted is to be first determined by the trial court. The trial court in the case at bar found the tape audible enough to be "enlightening to the jury." Having listened to the tape ourselves, we agree. Though defendant's voice is often inaudible, he can clearly be heard describing the incident at Dewey Brothers and, at one point, saying, "I done killed the m----- f-----." As noted in Searcy, "a tape recording should not be excluded merely because parts of it are inaudible if there are other parts that can be heard." 20 N.C. App. at 565, 202 S.E.2d at 317-18. We hold that the trial court did not err in admitting the tape recording.

Nor is there merit to defendant's argument that he was unfairly prejudiced when Angelo Farmer and the prosecutor were permitted to "interpret" the tape recording for the jury. Farmer testified to defendant's statements from his own knowledge of the conversation, not from listening to the tape recording. The prosecutor, in his closing statement, argued that the tape contained various incriminating statements by defendant. It was up to the jury, however, to decide what defendant said. The jury was free to discredit Farmer's testimony, and the prosecutor's arguments, if it saw fit to do so.

This assignment of error is overruled.

E

Defendant next assigns error to the State's use of two photographs showing the victim as found at the crime scene, lying faceup with blood streaked across his face and head. The State first introduced these photographs to illustrate the testimony of Dewey Brothers, Inc., president Richard Helms, who found the victim's body. A few days later, the State published these photographs to the jury a second time to illustrate the testimony of Officer Honeycutt, the SBI agent who analyzed the crime scene. Defendant takes issue not with the initial publication of the photographs, but rather with their republication. Characterizing the photographs as "excessively grim," he argues that the second showing had no value other than to inflame the passions of the jury. We believe the trial court acted correctly in permitting the photographs to be twice published.

Whether to admit gory photographs, how many to admit and how the photographs should be used are questions left to the sound discretion of the trial court, guided by the precept of Rule 403 of the North Carolina Rules of Evidence, N.C.G.S. § 8C-1, that evidence may be excluded if its probative value is "substantially outweighed" by the danger of unfair prejudice. State v. Hennis, 323 N.C. 279, 283, 372 S.E.2d 523, 526 (1988). The trial court's ruling will not be overturned absent an abuse of discretion. Id. at 285, 372 S.E.2d at 527. As a general rule, gory photographs have been held admissible, if properly authenticated and otherwise competent, as long as they are not aimed solely at arousing the passions of the jury, i.e., if they have some probative value. See, e.g., State v. Murphy, 321 N.C. 738, 365 S.E.2d 615 (1988), State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), cert. denied, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988); see also 40 Am. Jur. 2d Homicide § 419 (1968). By the same token, gory photographs have been held excludable if they merely reiterate photographic evidence already presented, since the additional photographs may lack probative value, tending only to inflame the jury. Hennis, 323 N.C. at 286, 372 S.E.2d at 526-27; State v. Mercer, 275 N.C. 108, 120, 165 S.E.2d 328, 337 (1969). The same logic, of course, has been applied to the repeated publication of the same photograph or set of photographs. Hennis, 323 N.C. at 286-87, 372 S.E.2d at 528.

In Hennis, a triple murder case, the trial court admitted thirty-five color photographs of the murder victims, taken at the crime scene and at the autopsy. The

photographs depicted in graphic detail numerous stab wounds on each of the bodies, and were particularly gruesome since the bodies had begun decomposing by the time the pictures were taken. The trial court permitted the photographs to be shown to the jury twice. The photographs were first shown as slides, projected on a large screen directly above defendant's head, and accompanying testimony by those who found the bodies and by the forensic pathologists. At the close of the State's evidence, the photographs were distributed to the jury one at a time, unaccompanied by further testimony. 323 N.C. at 282-83, 372 S.E.2d at 525-26.

On these facts, this Court ordered a new trial, reasoning that many of the slides were repetitive, showing substantially the same images, and thus added nothing of probative value to the State's case; that the manner in which the repetitive slides were displayed served to compound their prejudicial effect; and that the republication of the photographs was redundant and performed in a prejudicial manner. Id. at 286, 372 S.E.2d at 527-28. The Court said, "permitting the photographs with redundant content to be admitted into evidence and to be twice published to the jury was error." Id. at 286-87, 372 S.E.2d at 528.

Defendant analogizes the case at bar to Hennis, arguing that the republication of the photographs was "unnecessarily repetitive" and that it was performed "for no other reason than to inflame the jurors' anger towards defendant." Defendant's analogy is inapposite. First, unlike the situation in Hennis, here the republication of the

photographs had probative value. Whereas the photographs were first published to illustrate Helms' testimony describing in broad terms the crime scene as found, they were republished in aid of Officer Honeycutt's detailed testimony reconstructing the manner in which the crime had occurred. Indeed, Helms testified merely that he had found the body in the steel shed, lying faceup with arms and legs straight out and blood on the face and head. Honeycutt testified to the precise location of the body, measured to the inch from the walls of the shed, and to having discovered no blood on the ground around the body despite a painstaking search. He testified that the blood from the victim's wounds had run across his head horizontally and diagonally and was spattered on the victim's arms, on the front of his jacket and on one of his hands. Clearly, the republication of the photographs would have been quite useful in illustrating Honeycutt's more detailed testimony. By contrast, the photographs in Hennis were republished without any further testimony.

Second, the republication of the photographs in the case at bar created very little danger of unfair prejudice. Even though they show the victim's multiple head wounds, and blood covering his face and head, the photographs are not nearly as gory as those in Hennis. Nor were the photographs presented in a fashion likely to heighten the jury's emotional reaction. Recall that in Hennis, the prosecution concluded its case in chief by passing the thirty-five photographs to the jury one by one and in total silence. By that time, the jury had been exposed to seventy gory, disturbing images. 323 N.C. at 286, 372 S.E.2d at 528. Here the prosecution republished the photographs to the jury

along with roughly sixty other exhibits germane to Officer Honeycutt's testimony. With the republication, the jury had been exposed to four gory images.

Thus, the republication was probative and created little danger of unfair prejudice. We hold the trial court did not abuse its discretion in allowing it.

This assignment of error is overruled.

F

Defendant contends, finally, that the trial court erred in denying his motion to suppress statements he made at his arrest and physical evidence seized during a search incident to that arrest. According to defendant, the statements should have been suppressed because obtained in violation of Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694 (1966); the physical evidence should have been excluded because a fruit of the illegally obtained statements. See Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441 (1963).[18] We believe the trial court properly denied defendant's motion.

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[18] In the caption for this assignment of error, defendant also asserts that the evidence was introduced in violation of the Fourth and Sixth Amendments and of Article 19 of the North Carolina Constitution. He has failed to brief these contentions, however, and we deem them abandoned under the authority of N.C. R. App. P. 28(a).

At the suppression hearing, Officer Sullivan testified as follows. Pursuant to warrants for murder and attempted safe-cracking, he arrested defendant at a boarding house called the Salem Lodge, in the room of one Mr. Artis. Upon placing defendant in custody, he informed him of his Miranda rights and asked whether he understood those rights. Defendant responded, "yes." He then asked defendant, first, whether he wished to waive his right to remain silent, and then, whether he wished to waive his right to have counsel present during questioning. Defendant stood mute at each of these questions, making no response whatsoever. Soon thereafter, someone behind Sullivan asked defendant whether anything in the room belonged to him. Defendant responded that he owned the boxes (located on the floor). Sullivan then asked defendant whether he would consent to a search of the boxes, to which defendant responded, "yes." The boxes, containing clothing and other personal effects, were searched for weapons and then removed to the police station.

Sullivan testified further that there were four officers at the scene of the arrest, two in the room and two at the door; that neither promises, nor threats, nor trickery were used to elicit defendant's statements; that defendant appeared to be coherent; and that defendant did not appear to be under the influence of drugs or alcohol.

Crediting this testimony, and discounting defendant's testimony to the contrary, the trial court found as fact that defendant had been read his rights, that he did not respond to Sullivan's questions regarding waiver but thereafter indicated he owned the boxes and consented to having them

searched, that he made these statements free from coercion or inducement and while coherent, and that he understood his rights. Based on these findings, the trial court held defendant's statements admissible, concluding that he had "freely, knowingly, intelligently, and voluntarily" waived his rights to remain silent and to counsel. The trial court also held the boxes admissible because seized incident to a lawful arrest; it thereupon denied defendant's motion to suppress.

Defendant does not take issue with the trial court's findings of fact. He challenges instead the court's conclusion of law that he knowingly and voluntarily waived his Miranda rights. According to defendant, waiver cannot be inferred from his conduct at the arrest since he "never said or did anything . . . to indicate he had waived his rights." To the contrary, however, defendant answered the officers' questions free from coercion and after indicating that he understood his rights. These facts are sufficient to justify the trial court's ruling that he impliedly waived his rights.

North Carolina v. Butler, 441 U.S. 369, 60 L. Ed. 2d 286 (1979), established that waiver of Miranda rights may be either express or implied. In that case, the defendant was advised of his Miranda rights and indicated that he understood those rights. He refused, however, to sign a written waiver, stating: "'I will talk to you but I am not signing any form.'" He then made incriminating statements. Id. at 371, 60 L. Ed. 2d at 291. Overruling the North Carolina Supreme Court's holding that the defendant's waiver was invalid because not "specifically made," the Court held that an express written or oral statement of waiver

was "not inevitably either necessary or sufficient to establish waiver." 441 U.S. at 373, 60 L. Ed. 2d at 292. As the Court explained:

> The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case. As was unequivocally said in Miranda, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights . . . . [I]n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

Id.

Following the lead of Butler, this Court has consistently held that a defendant may validly waive his Miranda rights by answering questions from the police, even though he has initially refused to expressly waive his rights. In State v. Connley, 297 N.C. 584, 256 S.E.2d 234, cert. denied, 444 U.S. 954, 62 L. Ed. 2d 327 (1979), the defendant stated after reading an Advice of Rights form, "'I know what it says and I understand, but I'm not going to sign it.'" He then answered questions for a short time, ignoring some questions and terminating the interview by asking for a lawyer. Id. at 586-88, 256 S.E.2d at 236. On

these facts, we held that the defendant had impliedly waived his Miranda rights. Id. at 588-89, 256 S.E.2d at 237. Similarly, in State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982), we found a valid waiver where the defendant did not expressly waive his rights but rather indicated that he understood them and then answered questions "during a general conversation that occurred on the way to the jail." Id. at 92, 96, 291 S.E.2d at 602, 604.

In both of these cases, the critical facts supporting waiver were: 1) that the defendant demonstrated an understanding of his rights, and 2) that the questioner exerted no pressure on the defendant to answer questions, whether by way of coercion, intimidation or trickery. Connley, 297 N.C. at 588-89, 256 S.E.2d at 237; Vickers, 306 N.C. at 96, 291 S.E.2d at 604. These facts obtain equally in the case at bar. First, though defendant remained silent when asked if he would waive his rights, he did affirmatively state that he understood his rights. He appeared coherent at the time and was, as the trial court also found, "capable of understanding his rights." Second, the police did not pressure him in any way to answer their questions. Thus, we can infer that in answering the officers' questions after expressly acknowledging that he understood his right not to do so in the absence of counsel, defendant impliedly waived his rights to remain silent and to counsel.

Since defendant's statements were legally obtained, the seizure of the boxes he identified as belonging to him, otherwise legal, was not tainted. We conclude that the trial court properly admitted defendant's statements and his boxes.

This assignment of error is overruled.

IV

Having found that the trial court gave an unconstitutional instruction on the meaning of "reasonable doubt," we order a new trial. Those additional assignments of error discussed above are overruled.

NEW TRIAL.

Justice Parker did not participate in the consideration or decision of this case.

No. 264A90 - State v. Williams

Justice MEYER dissenting.

I dissent from the majority's decision to grant a new trial for Cage error essentially for the same reasons I expressed concerning that issue in my dissent in State v. Montgomery, 331 N.C. 559, 577, 417 S.E.2d 742, 752 (1992), and State v. Bryant, ___ N.C. ___, ___, 432 S.E.2d 291, 297 (1993). As in Bryant, defendant here did not object to the reasonable doubt instruction given by the trial judge.

Cage does not dictate that we find reversible error in the instant case. In Cage, the Supreme Court found error in the Louisiana trial court's reasonable doubt instruction, stating:

> The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather

> than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Cage v. Louisiana, 498 U.S. 39, 41, 112 L. Ed. 2d 339, 342 (1990) (emphasis added).

In reading Cage broadly, the majority opinion deviates from virtually every other appellate court in the land that has considered the matter. See Gaskins v. McKellar, ___ U.S. ___, 114 L. Ed. 2d 728 (Stevens, J., concurring in denial of writ of certiorari and acknowledging that Cage is to be read narrowly and emphasizing the critical import of the "grave uncertainty" language), reh'g denied, ___ U.S. ___, 115 L. Ed. 2d 1098 (1991); Smith v. State, 588 So. 2d 561 (Ala. Crim. App. 1991) (finding no error in use of terms "actual and substantial doubt" and "moral certainty"); Adams v. State, 587 So. 2d 1265 (Ala. Crim. App. 1991) (finding permissible use of terms "actual and substantial doubt" and "moral certainty"); Fells v. State, 587 So. 2d 1061 (Ala. Crim. App. 1991) (finding use of term "moral certainty" to be proper); People v. Jennings, 53 Cal. 3d 334, 807 P.2d 1009, 279 Cal. Rptr. 780 (same), cert. denied, ___ U.S. ___, 116 L. Ed. 2d 462 (1991); Commonwealth v. Beldotti, 409 Mass. 553, 567 N.E.2d 1219 (1991) (instruction permissible with "moral certainty" language); State v. Morley, 239 Neb. 141, 474 N.W.2d 660 (1991) (instruction permissible when "moral certainty" and "actual and substantial doubt" used).

The majority's extremely broad interpretation of Cage in Bryant, which it says dictates the result here, seems more an excuse than a reason for granting a new trial. The reasonable doubt instruction that the majority finds to be reversible error is one that has been employed by our trial judges for many years and in many cases. I anticipate that this Court will be called upon to review many cases in which the same or a similar jury charge was employed. Unlike McKoy error, which affects only the sentencing proceeding of a capital trial, the error here affects both capital and non-capital trials and requires a totally new trial. The impact of McKoy on our criminal justice system may dim in comparison to the impact of this Court's interpretation of Cage. For this and other reasons, I would allow a federal appellate court to speak to this issue before granting new trials that may prove to be unnecessary.

I believe that the majority errs in its conclusion that the reasonable doubt instruction tendered by the trial court was error requiring a new trial.